1958

David McMurdie et al v. Alvin Underwood et al : Brief of Appellant

Utah Supreme Court

E. L. Schoenhals; Attorney for Appellants;

IN THE SUPREME COURT OF THE STATE OF UTAH

DAVID McMURDIE, WILLIAM WHITAKER, CAROL WHITTAKER, and DENISE WHITTAKER, by her Guardian Ad Litem, William Whittaker,

Plaintiffs and Appellants,

— vs. —

ALVIN UNDERWOOD, JOSEPH JOHNSON, H. E. WOOLF, and NORTH AMERICAN VAN LINES,

Defendants and Respondents.

Case No. 8894

APPELLANT'S BRIEF

Respectfully submitted,

E. L. SCHOENHALS,
Attorney for Appellants

INDEX

CASES CITED

TEXT

STATUTES

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STATEMENT OF FACTS

Three large tractor-semi trailer type motor vehicles were parked on the highway on December 15, 1957. About 2:30 o'clock A.M. the first unit had difficulty with its headlights and parked with the wheels on the right side on the shoulder and the wheels on the driver's side on the paved portion of the highway (Ex. 6-D-134-23 and 218-24.).

Being partially parked on the sloping shoulder this unit was in a tilting position. This unit is referred to as Unit 1. Defendant Alvin Underwood was driving Unit 2, the Johnson unit. Unit 2 passed Unit 1 and stopped and parked with all wheels on the paved portion of the highway 100 to 150 feet ahead of Unit 1. (T. 218-4-Ex. 6-D.) Underwood then walked back to Unit 1 to render assistance.

Defendant H. E. Woolf was driving North American Van Lines Unit 3. Unit 3 passed units 1 and 2, and stopped and parked on the paved portion of the highway 100 to 150 feet ahead of Unit 2. All three large tractor-trailer units were facing east. Unit 1 was partially on the shoulder, Units 2 and 3 were parked with all wheels on the paved portion of the highway. Plaintiffs, all in a Nash car driven by William Whitaker, passed Unit 1, but because of oncoming traffic, pulled up and stopped behind Unit 2 to permit traffic coming from the opposite direction to pass. (T. 138-9-136-19-142.4.)

Units 1, 2, 3, and the Whittaker unit were all to the right of the center line. There was evidence by the plaintiffs and an independent witness that the Johnson unit, No. 2, driven by Underwood had no lights on. (T. 238-22-24) (239-25) (247-18, 20, 25.) The party so testifying being the first to arrive, 2 or 3 minutes after the accident. (244-12.) All units were facing easterly and while all were thus parked, Nancy Dillingham, operating a fourth car, a Chevrolet pickup truck, passed Unit 1 and cut back in to the right side to avoid traffic approaching from the opposite direction, (254-10), and ran into the rear of the Whittaker Nash car parked behind Unit 2, forcing it against Unit 2 resulting in the injuries and damages. The pre-trial order found Nancy Dillingham negligent.

Nancy Dillingham settled with plaintiffs, and plaintiffs proceeded against the remaining defendants. The jury returned a verdict no case for action.

STATEMENT OF POINTS

1. ERROR IN INSTRUCTING THAT NANCY DILLINGHAM WAS NEGLIGENT AS A MATTER OF LAW, AND LATER INSTRUCTING THAT IF SHE WAS NEGLIGENT, HER NEGLIGENCE WAS THE SOLE PROXIMATE CAUSE AND TO FIND IN FAVOR OF DEFENDANTS.

2. REFUSAL TO INSTRUCT ON POSSIBILITY OF SO PARKING AS CONSTITUTING A TRAP OR DANGER.

3. ERROR IN INSTRUCTING THAT DEFENDANTS WERE UNDER NO DUTY TO PLACE LIGHTED FLARES AROUND VEHICLES.

4. REFUSAL TO INSTRUCT JURY OF DUTY TO PROCEED UNTIL THE DEFENDANTS COULD SAFELY PARK OFF THE HIGHWAY.

5. REFUSAL TO DEFINE THE WORD "PRACTICABLE" AS NOT BEING SYNONYMOUS WITH CONVENIENT.

ARGUMENT

POINT 1

ERROR IN INSTRUCTING THAT NANCY DILLINGHAM WAS NEGLIGENT AS A MATTER OF LAW, AND LATER INSTRUCTING THAT IF SHE

WAS NEGLIGENT, HER NEGLIGENCE WAS THE SOLE PROXIMATE CAUSE AND TO FIND IN FAVOR OF DEFENDANTS.

In Instruction 6(T-80) the court instructed the jury that Nancy Dillingham, the driver of the pickup truck, was negligent as a matter of law as found in the pre-trial order.

The court instructed the jury in Instruction 27(T-103) as follows:

> "You are instructed that the driver of the pick-up truck was negligent as a matter of law, and if you find that she observed the hazards, if any, of the stopped vehicles upon the highway or under the circumstances should have observed said vehicles, but because of her negligence failed to do so in time to avoid said accident, *then you are instructed that the negligence on her part was the sole proximate cause of the collision*, and your verdict must be in favor of the defendants and against the plaintiffs, no cause of action."

Instruction 27 was excepted to and the court invited to change it (T-303-14).

Under such an instruction the court took away from the jury any question of concurrent contributing negligence on the part of the defendants and whether defendants' negligence was a contributing proximate cause. It is the perogative of the jury to determine whether under the facts defendants and respondents were negligent, and whether or not negligence of the defendants proximately contributed to the resulting injuries and damages.

The court's instructions constitute a directed verdict against plaintiffs. This is an invasion of the provence of the jury and error.

POINT 2

REFUSAL TO INSTRUCT ON FORESEEABILITY OF PARKING AS CONSTITUTING A TRAP OR DANGER.

The court erred in refusing to give requested instruction 10(T-49). This instruction requested the court to instruct the jury that if they should find from a preponderance of the evidence that an ordinary prudent person should have foreseen that so parking a series of large units was likely to result in injury, or that the ordinary prudent person could have foreseen that the placing of a solid wall of trucks without using lanterns or flares, or by reason of spacing would be foreseeable as a likely trap or danger to traffic was certainly a proper request.

Refused request no 12 (T-51) is copied in part from Hillyard vs. Utah By-Products, 263 P2d at 287, 1 U2d 143. Under this instruction negligence is defined as exposing another to unreasonable risk or harm or foreseeable conduct whether it be innocent negligence or criminal, and since the Supreme Court has defined it so at page 290 refusal to so instruct was error. See request no. 14 (T-53). It was error not to instruct that it is not necessary to foresee the exact form in which the accident happened from the Hillyard case above, quote:

> "The test of liability is not whether . . . the defendant could . . . have foreseen the precise form in which the injury actually happened, but he must be held for anything which . . . appears to have been a natural and probable consequence of his act. If the act is one which [he] . . . could have anticipated as likely to result in injury . . .".

Error in refusal to give request 17(T-56) on the question of whether or not it was foreseeable that a series of large units so parked might likely result in injury. See Shelton v. Lowell, 249 P2d 958, Ore.

> "The question is: could the defendants have foreseen in the exercise of ordinary care that their act in leaving the truck on the highway without a warning flag being placed 300 feet to the south or at the curve on the highway would naturally and probably result in harm of some kind to another."

Plaintiffs are entitled to have the court instruct the jury in such a manner that the theory of plaintiffs' case may be presented to the jury, Miller v. Southern Pacific, 21 P2d 865, 82 U 46.

> "Each party to a law suit is entitled to advocate his theory and on submission to the jury is entitled to a submission of it upon his theory, and have the jury instructed on his theory, and the law as applicable to such theory; but such right does not include therein the right to develop a theory of law for the particular case. . . ."

POINT 3

ERROR IN INSTRUCTING THAT THE DEFENDANTS WERE UNDER NO DUTY TO PLACE LIGHTED FLARES AROUND VEHICLES.

Plaintiffs' requested instructions no. 18, 19, 34, and 35 requested the court to permit the jury to determine whether under the facts and circumstances the defendants were negligent in not placing lighted flares on the road. The court refused all these requests. Defendants Alvin Underwood and Joseph Johnson admit they were parked

on the highway fifteen (15) minutes—see Answers to Interrogatories T-32-13 also under evidence. There was evidence Unit 2 had no lights on. Under Instruction No. 23 the court instructed:

> "They were under no *duty* to place lighted flares around the vehicles."

Under this point the court erred for three reasons:

1. It does not require an act of the legislature to create a duty, the violation of which constitutes negligence. There is no statute requiring a motorist to keep a proper lookout. Yet it would be error for the court to instruct that a defendant was under no duty to keep a lookout. Large units 60 feet long and 8 feet wide owe a greater duty when parked than does a smaller car. Whether or not the defendants were under a duty to place out flares depends on all the circumstances, and the plaintiffs were entitled to go to the jury on the question of whether three large units parked in a series under the evidence and without flares constituted negligence. The jury might have found that a motorist could believe he could safely pass one or two units and find himself in a trap, unable to pass the second or the third unit because of traffic in the opposite direction. It was therefore error for the court to instruct the jury that the defendants were under no duty, because a duty can be imposed upon a person with respect to a foreseeable conduct likely to expose another to risk or harm whether there is a statute imposing such a duty or not. Moreover, Nancy Dillingham testified that as she approached, the parked tractor-trailer appeared to be moving and because "they were on open highway" T-252-11, 15, 26. Flares out would have left no question in her mind on this point,

she was very near the unit when she first learned it was not moving. T-254-10.

2. The State law requires disabled tractor-trailers to place out flares. The mere fact that the defendant were not disabled does not relieve them from such responsibility. 41-6-101 U.C.A. 53 prohibits a vehicle not disabled from parking on the highway. 41-6-152 requires disabled vehicles of the types involved to place out flares. Certainly where there is a prohibition of parking where practical to park off the pavement, it follows that the legislature did not intend to license vehicles not disabled to park without placing out flares or to park on the pavement of the highway in the night without placing of flares, or warnings.

3. Defendants were non-residents engaged in interstate commerce, see Paragraphs 2, 3, 4, 5, and 6 of the Amended Complaint, T-1, Notice of Service, T-9, and Affidavit, T-6. Defendant Alvin Underwood testified he knew the law required, if disabled, that flares be placed out. T-279-25. Underwood was there assisting a disabled vehicle for fifteen minutes. Defendants did not put out flares or suggest to the disabled vehicle's operator that he put out flares. T-277-22 to 278-11 inclusive. Defendants did not put out any flares. T-252-28. Federal Law requires the defendants to place out flares. Regulations of the Interstate Commerce Commission have the force and effect of law. Woods vs. New York City, 88 NE2d 740:

> "Under that act the Interstate Commerce Commission is empowered to make rules and regulations . . . These regulations have the force of law and are judicially noticed-317 US 481. Strict compliance with the rules and specifications, etc."

Williams vs. New York Central, 84 NE2d at 403:

> "The rules adopted by Interstate Commerce Commission . . . are as integral part of the act and have the force of the statute. . . ."

The regulations of the Interstate Commerce Commission are as follows:

S 192.23

> "Emergency Signals: Stopped or parked vehicles. Whenever *for any cause* other than disablement or necessary traffic stops, any motor vehicle *is stopped* upon the traveled portion of any highway, or shoulder thereof, during the time lights are required except within a municipality where there is sufficient highway lighting to make clearly discernible persons and vehicles on the highway at a distance of 500 feet, the following requirements shall be observed:
>
> (a) The driver of such vehicle shall immediately place on the traveled side of the vehicle, a *lighted fusee*, a lighted red electric lantern, or a red emergency reflector."

These regulations have the force and effect of law.

The case of TWA vs. Northland Greyhound, 275 NW 846, held that the question of whether or not flares should have been placed out is a jury question.

POINT 4

REFUSAL TO INSTRUCT THE JURY OF DUTY TO PROCEED UNTIL DEFENDANTS COULD SAFELY PARK OFF THE HIGHWAY.

41-6-101 UCA 1953 provides as follows:

> ". . . No person shall stop, park, or leave standing any vehicle, whether attended or unattended upon the paved or main traveled part of the highway when it is PRACTICAL to stop, park, or leave such vehicle off such part of said highway."

Failure to give requested instruction (20(T-59) that defendants had a duty to proceed forward until they could safely take their vehicles off the paved portion of the highway was error. Refusal to give request 21(T-60) was also error. The latter stating that the rendering of assistance does not relieve the defendants of responsibility so far as negligence is concerned, see Gorego vs. Cornwall, 222 P2d 606. Defendants did not even consider driving ahead 300 or 400 feet to see if he could park off the road (T-295-6), yet the court took this from the jury's consideration. The court even refused to permit testimony on the issue to show the road was wide enough to park off just immediately a few hundred feet ahead, and labeled it as "unfair" to show this (T-301-1).

Failure to give requested instruction no. 13 was error. This request was copied from Hillard vs. Utah By-Products, supra, wherein the court stated:

> "The parking of a vehicle upon the paved or traveled portion of a highway is generally regarded as a hazard to traffic thereon. . . ."

The jury was led to believe that the defendants could park any place they pleased on the highway by the court's refusal to instruct as requested. This is particularly true in light of Point 5 which follows. See also Borgert vs. Spurling, 230 P2d 183.

> "Alvin Fox clearly violated the parking statute. His car was not disabled, and, Good Samaritan though he was, his generous impulses afforded him no exemption from the statute's command. . . ."

The evidence was that defendants could have pulled off the highway at a lighted motel 2, 3, or 4 blocks ahead, T-240-7.

POINT 5

REFUSAL TO DEFINE THE WORD "PRACTICABLE AS NOT BEING SYNONYMOUS WITH CONVENIENT.

The statute quoted under point 4 uses the word practical. Refusal of request no. 1 was error. The jury should have been instructed that the word practical is not synonymous with convenient and 60 C.J.S. 773, Note 69 was quoted at the bottom of the instruction where the law requires such an instruction.

The court refused to instruct the jury that the word practicable was not synonymous with convenient, or at all on this point. The jury was left with the impression that the defendants could park any placed they pleased without regard to the safety to others, since the court refused to define practical as other courts have.

Respectfully submitted,

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